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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 1970

JURIS. STATEMENT NOT PRINTED

No. ~~1780~~ ~~[illegible]~~

No. 778

In the Matter of

SAMUEL WINSHIP,

Appellant.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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TABLE OF AUTHORITIES

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The appellee, pursuant to a request of the Court transmitted by its Clerk, moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that some of the questions presented were not raised in the Courts below and all of them are so unsubstantial as not to need further argument.

ARGUMENT

Due process of law and the equal protection of the law do not require that the acts alleged in a juvenile delinquency petition be proved beyond a reasonable doubt. Section 744(b) of the New York Family Court Act, which requires that the finding of facts be based upon a preponderance of the evidence, is constitutional.

(1)

Under New York law, a juvenile delinquent is a person under sixteen years of age who has committed an act

which if done by an adult would constitute a crime and who, in addition, requires supervision, treatment or confinement (Fam. Ct. Act, §731). Both the finding that the act was committed by the child and the determination that he is in need of supervision, treatment or confinement must be based upon a preponderance of the evidence adduced at successive fact-finding and dispositional hearings (Fam. Ct. Act, §§744(b), 745(b)). A failure of proof at either stage requires dismissal of the delinquency petition.

In the case at bar, the appellant seeks a declaration of unconstitutionality of Section 744(b) of the Family Court Act which sets forth the permissible standard of proof at the fact-finding hearing. That standard was accepted in *People* v. *Lewis,* 260 N. Y. 171 (1932), cert. den. 289 U. S. 709 (1933), and even the strongly worded dissent did not disagree on this point. It is the commonly accepted rule. Note, *Juvenile Delinquents: The Police State Courts, and Individualized Justice,* 79 Harv. Law Rev. 775, 795 (1966).

The appellant contends, however, that the standard of proof in delinquency hearings must be identical to the criminal law burden of proving guilt beyond a reasonable doubt. Essentially, the argument is that, where loss of liberty is possible, due process of law forbids the imposition of a lesser standard. In addition, it is urged that it would be a denial of equal protection of the laws to provide the juvenile with less protection than is afforded the accused adult offender. Accordingly, the appellant asserts that he was denied his constitutional rights because the hearing judge was authorized to, and did, make his finding on the basis of the supposedly unconstitutional "preponderance" test.

The argument, though forceful, is not conclusive. That it deserves careful scrutiny is a reflection of the recently

awakened and wholly justifiable judicial interest in juvenile court proceedings evidenced by the landmark decision in *In re Gault*, 387 U. S. 1 (1967). That case, however, does not mandate the result sought herein. Indeed, this Court in *Gault* emphatically stated that its decision indicated no opinion on those issues, including the correct burden of proof, which were not then being decided. *In re Gault, supra,* at pp. 10-12. Moreover, subsequent cases which have dealt with the issue have not done so persuasively or in depth. See *e.g., United States* v. *Costanzo,* 395 F. 2d 441 (4th Cir., 1968); *Santana* v. *State,* 431 S. W. 2d 558 (Civ. App. Tex., 1968, not officially reported); *In re Urbasek,* 38 Ill. 2d 535, 232 N. E. 2d 716 (Ill. 1967) and *In re Wylie,* 231 A. 2d 81 (D.C.C.A., 1967). In addition, as we shall show, the dictates of essential fairness and sound policy do not require the incorporation of this particular rule of criminal law into New York delinquency proceedings.

Initially, however, it should be noted that the appellant's plea for reversal cannot be entertained at all unless it is first demonstrated that the reasonable doubt rule is an element of due process of law as applied to adults accused of crime.

The Court in *Gault* was not dealing with particular statutory protections for criminal defendants that might be beneficial to juveniles charged with delinquency. What was before the Court was not a question of equal protection of the laws, but one of due process of law. Certain essential ingredients of due process, it was held, must be afforded the juvenile. These include the right to notice, counsel, cross-examination and the privilege against self-incrimination. The guarantee of these rights, however, does not mean that a delinquency hearing "must conform with all of the requirements of a criminal trial or even of

the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment'" 387 U.S. at p. 30, quoting *Kent* v. *United States,* 383 U.S. 541, 562 (1966).

Employing this approach, the Court refused to rule that Arizona's denial of a right of appeal in juvenile cases was unconstitutional. The Court noted that a right to appellate review is not required by the Constitution. Yet, such a right was granted by Arizona to convicted criminals, and that right is surely an important one. 13 Ariz. Rev. Stat. 713 (1959). What we are left with, then, is the inevitable conclusion that only those criminal law rights which are of constitutoinal dimension and part of due process of law are eligible for mandatory inclusion in juvenile proceedings. As we shall show, this does not mean that if it is a rule of constitutional law for adults it must be granted to juveniles; it does mean that such a holding is a necessary prerequisite.

(2)

At the outset, it might be useful to explore the concept of reasonable doubt as used in criminal cases. Interestingly, although some federal and state criminal cases contain language to the effect that the rule is an ingredient of due process of law,* there seems to be no square holding that the requirement of proof beyond a reasonable doubt is of constitutional dimension. While such a holding would not be dispositive of the instant case, it ap-

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* See e.g. *Government of Virgin Islands* v. *Lake,* 362 F. 2d 770, 774 (3d Cir., 1996); *Government of Virgin Islands* v. *Torres,* 161 F. Supp. 699 (D.C., V.I. 1958); *People* v. *Terra,* 303 N. Y. 332, 334 (1951); *State* v. *Dantonio,* 18 N.J. 570, 115 A. 2d 35 (1955); *State* v. *Kelly,* 218 Minn. 247, 15 N W 2d 554, 560 (1944); *People* v. *Licavoli,* 264 Mich. 643, 250 N.W. 520 (1933).

pears that the right to o proof beyond a reasonable doubt in criminal cases as an n element of due process has yet to be authoritatively estab blished.

Of course, it might b be argued that, since the rule has such widespread accept ptance, the occasion for conclusive adjudication has not ar arisen and this fact itself is signifi- cant. Notwithstanding g this possibility, troublesome ques- tions are present. For or, when we examine the judicial treatment of the rule, it it is apparent that there is a sharp distinction between wh what courts say about the require- ment of proving guilt lt beyond a reasonable doubt and how they behave in im implementing it. Further doubt is raised when we contras ast the judicial approach to reason- able doubt questions a and burden of proof problems in general with the appr roach to other criminal law rights which are unquestionab bly of constitutional status.

What seems clear is s that implementation of the rule is not placed on the level el of constitutional law. What due process of law does req quire was set forth by the Supreme Court in *Thompson* v. *Louisville*, 362 U. S. 199 (1960), where the Court held th that it is a violation of due process to convict and punish a a man without any evidence what- soever of his guilt. Tha hat is, to be constitutionally valid, a conviction must be supp pported by *some* evidence, not neces- sarily evidence proving g guilt beyond a reasonable doubt.

Cases involving real l questions of constitutional import are treated in a marked edly different fashion. For example, when confronted with a a claim that a book is or is not ob- scene or that a confessi sion is or is not coerced, this Court does not limit its func ction to a determination that there is some evidence or ev even that there is adequate or suffi- cient evidence to supp port the finding that the confession was voluntary or that at the book was obscene. On the contrary, the Court de denies that it is at all bound by the

jury's conclusions. Indeed, it regards itself as obligated to make its own independent evaluation of the record in determining whether these particular constitutional rights have been violated. *Jacobellis* v. *Ohio,* 378 U. S. 184, 187-190 (1964); *Haynes* v. *Washington,* 373 U. S. 503, 515-516 (1963). And this holds even if the jury has been meticulously instructed on the law of confessions or the law of obscenity.

The reason for this approach is evident. Whether or not the will has been overborne so as to culminate in a confession is a factual question. Yet, because a man has a constitutional right not to be coerced, the Court will reach its own determination, notwithstanding the judgment of the jurors. The degree of pruriency expressed in a book would also seem to be a question capable of final resolution by the fact finders. But the demands of free expression require the Court to rely on its own judgment. No similar independent evaluation of the record is made to determine whether guilt has been proved beyond a reasonable doubt. As the Court has held, the 14th Amendment does not provide for review of mere error in jury verdicts. *Lyons* v. *Oklahoma,* 322 U. S. 596 (1944). On the other hand, the Court holds that such a review is required where it is claimed that constitutional rights have been impinged upon. Thus, if there truly were a constitutional right not to be convicted unless guilt has been proved beyond a reasonable doubt, there would seem no basis for providing a lesser mode of review than when faced with other claims of due process violations.

At this point it might be argued that a distinction must be made between the choice of the correct standard of proof and the role of a reviewing court. Once the burden has been properly imposed, the appellate court's function is severely limited [*Woodby* v. *Immigration and Naturalization Service,* 385 U. S. 276 (1966)], and it is only

the formulation of the standard that raises a constitutional issue.

But this approach merely begs the question, for it fails to tell us how we ascertain which standards and burdens are constitutionally ordained and which are not. In federal deportation, expatriation and denaturalization cases, for example, the Court, while noting the important personal interests at stake, has formulated a standard of proof ("clear, unequivocal and convincing") as an exercise of its judicial rule-making function, without regard to any explicit constitutional right. [See e.g., *Woodby* v. *Immigration and Naturalization Service, supra; Schneiderman* v. *United States,* 320 U. S. 118, 124-125 (1943); *Nishikawa* v. *Dulles,* 356 U. S. 129, 134-135 (1958); *Gonzales* v. *Landon,* 350 U. S. 920 (1955).]

Conversely, in *Speiser* v. *Randall,* 357 U. S. 513 (1958), the Court struck down a State denial of a tax exemption based upon a statute which imposed upon the taxpayer the burden of proving that he did not criminally advocate the unlawful overthrow of the government. It did so, not because of some abstract notion about burden of proof, but because the State, by placing the burden of persuasion on the claimant, violated his right to freedom of speech—a constitutional right protected by the due process clause of the 14th Amendment. Due process of law also requires, as we have seen, some evidence of guilt. A statutory presumption which practically eliminates the need to produce some evidence of guilt would therefore be violative of due process. *Tot* v. *United States,* 319 U. S. 463, 473 (1943) (concurring opinion of BLACK, J.).

The difference would seem to be this: the imposition of a particular burden or standard of proof and persuasion is constitutionally required where its purpose is to protect a right which is itself of constitutional weight. The

question of whether a defendant's guilt has been proved by a particular quantum of evidence is not viewed by the Courts as a constitutional question. Hence, since the reasonable doubt standard is not intended to protect a constitutional right, it is not itself of constitutional dimension.

(3)

Nothing said thus far is intended to deny the importance and significance of the reasonable doubt rule in criminal cases. Although it has been said that the rule did not appear until the end of the 18th century and was applied at first only in capital cases [9 WIGMORE, *Evidence,* §2497 (3d Ed., 1940); MCCORMICK, *Evidence,* 681-682 (1954)], it has become a settled standard of the criminal law. *Holland* v. *United States,* 348 U. S. 121 (1954).

Essentially appellant's argument would appear to be that, as a matter of constitutional law, nobody may be incarcerated unless the proof leading to the determination which is the basis for the incarceration is established beyond a reasonable doubt. Even if such proof is constitutionally required in criminal cases, it does not follow that the Constitution imposes the identical requirement in all situations which may lead to incarceration. In New York, for example, the standard of proof in civil contempt proceedings is "reasonable certainty" [*Ketchum* v. *Edwards,* 153 N. Y. 534, 539 (1897)], which is a lesser standard than reasonable doubt. *People* v. *Cotto,* 28 A D 2d 1116, 1117 (1967).

Similarly, the reasonable doubt rule does not appear to be applicable to civil proceedings which lead to confinement of drug addicts. See *Robinson* v. *California,* 370 U. S. 660 (1962); *In re De La O,* 59 Cal. 2d 128, 378 P. 2d 793 (1963), cert. den. 374 U. S. 856 (1963). Nor does

such a requirement appear to be applied in civil proceedings to commit the insane.

(4)

When we examine the Family Court Act, it is apparent that the fact-finding hearing is not the juvenile delinquency equivalent of a criminal trial. In criminal cases, sentencing follows upon a verdict of guilt. Proof of the need to confine, treat or supervise the defendant need not be forthcoming and there is no evidentiary standard that must be met. The extent of punishment is discretionary within the permissible limits set by the statute. Barring an abuse of discretion, the punishment imposed stands as a legitimate consequence of the commission of the criminal acts. Indeed, even under statutes which have permitted the question of punishment—i.e. the issue of life imprisonment or death—to be submitted to a jury, the prosecution bears no burden of proof whatsoever. *People* v. *Dusablon*, 16 N Y 2d 9, 18 (1965); *People* v. *Mardavich*, 287 N. Y. 344 (1942).*

In letter, spirit and practice the Family Court approach is entirely different. Notwithstanding the commission of criminal acts, no juvenile may be adjudicated a delinquent until it is demonstrated at a dispositional hearing by a preponderance of the evidence that he requires supervision, confinement or treatment. Fam. Ct. Act, §745. Absent such proof, the petition must be dismissed. And petitions are dismissed on this very ground: in one year a total of 3,418 petitions out of a

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* Only under the most unusual circumstances, where the statute itself mandates a further proceeding, is additional proof required. See e.g., *Specht* v. *Patterson*, 386 U. S. 605 (1967); *People* v. *Bailey*, 21 N Y 2d 588 (1968).

total of 10,755 processed were dismissed for failure of proof. Of those dismissals, 1,176, or nearly 35% of the total dismissed, were dismissed for failure of proof at the dispositional hearing [12th Ann. Rep. Judicial Conference 314 (1967)]. A similar result is impossible in the criminal law. Even where the adult receives a suspended sentence, the indictment and conviction stand and he remains branded a criminal.

Hence, it can be said that the juvenile enjoys a substantial benefit denied to the adult offender since the fact-finding hearing does not stand in the same relation to an ultimate adjudication and confinement as does the criminal trial. New York, therefore, meets the test posed by the Supreme Court in *Kent* v. *United States,* 383 U.S. 541 (1966), the forerunner of *Gault,* as to whether there is "any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae* evidencing • • • special solicitude for juveniles • • •" *Id.* at 551-552.

In sum, what we have in New York, is a frank recognition that when dealing with children no intervention of any sort on the part of the State is justified unless a need for such intervention is demonstrated by adequate proof. If the proof fails, the State's interest ceases. No adult criminal is so protected. This is, indeed, an impressive libertarian principle. PAULSEN, *The New York Family Court Act,* 12 Buff. L. Rev. 420, 437 (1963). In short, the protection afforded the juvenile in New York in the resolution of the question of whether he should be deprived of his freedom is not equal to that given the adult; it is, in a sense, greater.

CONCLUSION

The appeal from the Court of Appeals of the State of New York should be dismissed.

July 3, 1969.

Respectfully submitted,

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